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763531—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 7

JAMES F. MORRIS, PETITIONER

v.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE INTERSTATE COMMERCE COMMISSION, AMICUS CURIAE

STATEMENT

This brief amicus curiae is submitted by the Interstate Commerce Commission at the suggestion of the Court.

The question before the Court involves the status under the exemption provision of section 13 (b) (1) of the Fair Labor Standards Act of certain employees (including drivers and mechanics) of a common carrier of property by motor vehicle, the carrier being engaged in interstate and foreign commerce although its trans-

portation is principally intrastate and its vehicular operations are conducted within one State.

The suit in the District Court was instituted by complaint of respondent asking that the petitioner, doing business under the name of J. F. Morris Cartage Company, be enjoined from violating the provisions of said Act, prescribing, as to employees "engaged in commerce or the production of goods for commerce," the maximum hours that they may be employed in any workweek unless paid for overtime at the rate of one and one-half times their regular wage (52 Stat. 1060, sections 7, 15 (a) (1) and 15 (b) (2)). Following the filing of an answer and an agreed stipulation of facts, the case was heard and the complaint dismissed, the District Court holding (1) that neither the carrier nor its employees were engaged "in the production of goods for commerce" within the meaning of the Labor Standards Act, and (2) that, to the extent they might be considered to be "engaged in commerce" within the meaning of said Act, the overtime pay provisions of section 7 were rendered inapplicable by section 13, in that the carrier's employees involved "were either employees employed in a bona fide executive or administrative capacity; i. e., dispatchers and superintendent of maintenance within the (exempting) language of section 13 (a) (1) or employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to section 204

of the Motor Carrier Act, 1935; i. e., truck drivers and garage employees, within the (exempting) language of section 13 (b) (1)" (R. 39, 40).

Upon appeal, the Circuit Court of Appeals, Sixth Circuit, reversed the judgment of the District Court (R. 47–54). On April 7, 1947, this Court granted the carrier's petition for writ of certiorari "limited to the second question presented," to wit:

> 2. Where such employees (employees of a common carrier by motor vehicle) during a minority of their time, are engaged in the transportation of interstate traffic, are they exempt under the provisions of Section 13 (b) (1) of the Act from the maximum hours provision of Section 7 of the Act * * * (Pet., p. 3).

As shown by the stipulated facts, petitioner motor carrier employed in 1941 approximately 40 truck drivers, 14 garage workers, certain of whom were mechanics, 3 dispatchers and 3 general office workers. Its equipment consisted of approximately 50 trucks and 60 trailers of various types. Its operations were centralized at a main garage and yard in Ecorse, Michigan, which were used "as a dispatching office, general maintenance and repair garage and storage space for equipment when not in active use" (R. 11, 12), and its principal customers were two subsidiaries of the National Steel Corporation, namely the Great Lakes Steel Corporation and Michigan Steel Corporation, both located at Ecorse (R. 20).

By subparagraphs A to E, inclusive, of Paragraph I (R. 12, 13), the stipulation of facts separates into 5 categories the types of operations performed by petitioner, and, by a table, designated as Exhibit A (R. 20, 21), it shows generally the percentage of petitioner's total 1941 revenue attributable to each such type of operation. While it is thereby shown (R. 12, 20) that, of petitioner's total 1941 revenue, approximately 96.7 percent was derived (1) from intraplant services performed for the Great Lakes and Michigan steel companies and (2) from shipments of freight (mostly "outgoing steel") transported for the account of the said two companies, it is also shown that petitioner held itself out to perform for the general public (R. 11, 12), and during the year 1941 did in fact perform for about 45 concerns in addition to the two steel companies (R. 20, 21), a general trucking service as a common carrier by motor vehicle.

Referring first to subparagraph B, Paragraph I, of the stipulation (R. 12): Approximately 35 percent of petitioner's operations is shown to consist of the transportation of steel within the plants of the Great Lakes and Michigan steel companies from one mill or portion thereof to another, or between the mills of those two companies; and such steel "is so transported for the purpose of further processing in the course of manufacture." "In these operations the (peti-

tioner's) trucks often operate within the plant and without leaving the plant for several days" (R. 12). Referring next to subparagraph A, it is there shown that a further approximately 60 percent of petitioner's operations consists of the transportation of steel (principally bumper stock, fender stock and other steel products, R. 14) from the mills of the Great Lakes and Michigan steel companies "at Ecorse, Michigan, to plants of various automobile manufacturers and other industrial establishments in the Detroit Metropolitan area." This transportation of petitioner, in contrast to its operations described in subparagraph B, is obviously conducted over the public highways and is of a kind or type which petitioner holds itself out to perform for the general public and which it does perform for numerous shippers other than the two steel companies. (See subparagraph E, Paragraph I, R. 13, and the first subparagraph of Paragraph II, R. 14.)

Taking up the remaining subparagraphs of Paragraph I (R. 13) in their order: As shown by subparagraph C, a further approximately 3 percent of petitioner's operations consists of the transportation of freight between the plants of the Great Lakes and Michigan steel companies, "on the one hand, and, on the other, interchange points, such as boat docks, railroad depots, freight terminals, and truck terminals lying in the Detroit Metropolitan Area, wholly within the boundaries

of the State of Michigan, involving the picking up of freight from or the delivery of freight to water carriers, railroad carriers, and line-haul motor carriers, which freight either has moved across the Michigan State lines or is about to move across the Michigan State lines in continuous transportation through connection between the (petitioner) and such other interstate carriers." As shown by subparagraph D, a further approximately 1 percent of petitioner's operations consists of the transportation of freight from various industrial establishments in the Detroit Metropolitan Area to the plants of the Great Lakes and Michigan steel companies. And, as shown by subparagraph E, a further approximately 1 percent of petitioner's operations consists of transportation of miscellaneous freight in general cartage for shippers other than the two steel companies, including transportation of such freight moving in interstate commerce.

Following the separation made of petitioner's operations into the types of transportation described in subparagraphs A to E, inclusive, of Paragraph I, the stipulation, as shown in Paragraph III (R. 15, 16), makes certain analyses of the driving activities of petitioner's drivers based on the number of trips made by such drivers in connection with transportation of the types described in said subparagraphs of Paragraph I. Out of a total of 19,786 trips by all drivers during

the year 1941, it is shown that 724 trips or 3.65 percent were pick up or delivery trips (of the types described in subparagraphs C or E) involving transportation of interstate freight and that the remaining 19,062 trips or 96.35 percent represented "interplant transportation" of the types described in subparagraphs A, B, and D. It is further shown as follows: That, in an average workweek, 75.6 percent of the drivers were exclusively engaged in "interplant trips" of the types described in subparagraphs A, B, and D and the remaining 24.4 percent made one or more pick up or delivery trips (types C and E) of freight moving in interstate or foreign commerce; that the "average employee" was exclusively engaged in "interplant transportation" (types A, B, and D) during 75.6 percent of the workweeks in 1941; that two employees were exclusively engaged in "interplant transportation" during the full period of their employment in 1941; and that, with two exceptions, all of petitioner's drivers were exclusively engaged in such "interplant transportation" during the greater part (50 percent or more) of the workweeks in 1941.

From the above, it appears that, for purpose of consideration of the question of applicability of the Fair Labor Standards Act, the general basis of separation of driver trips as made is as between pick-up and delivery trips made in transporting freight moving in interstate or foreign commerce,

on the one hand, and on the other, trips in performing "interplant transportation"; and that the latter include, not only trips in performing intrastate transportation of common carrier kind and over the public highways (i. e., transportation of type A or type D kind), but also trips in performing purely plant service (type B kind), confined to movements within the plants of the Great Lakes and Michigan steel companies.[1] The analyses of driver trips (R. 15, 16), in thus treating trips in performing plant service or movements as of the same general class as trips in performing transportation of types A and D kinds, are, it seems evident, particularly concerned with the facts as to the types of trips involved in their bearing on the question, originally in the case but not included in the review here, of whether petitioner's drivers were "engaged in the production of goods for commerce" within the meaning of section 3 (j) of the Fair Labor Standards Act. But that question is quite distinct from the question under review here of whether they are not in any event exempt from section 7 of that Act as employees within the meaning of section 13 (b); that is, as employees with respect to whom the Commission has power to establish qualifications and maximum hours of service pursuant to section 204 of the Motor Carrier Act of 1935.

[1] Except, perhaps, that such of the movements as are between the mills of the respective companies (R. 12) may be over-the-road, or highway movements.

Petitioner's status as an interstate common carrier by motor subject to the Act is affirmatively shown in the record and is not disputed by the Circuit Court of Appeals or by respondent. Accordingly, the question whether its drivers are employees with respect to whom the Commission has power to establish qualifications, etc., does not depend on the purpose or objectives of the Fair Labor Standards Act but is to be determined solely from the language and remedial purpose of the Motor Carrier Act, which embodies Congress' legislation for promotion of safety on the public highways of the country. *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 677; *Southland Co.* v. *Bayley*, 319 U. S. 44, 48–49. The question is essentially, then, one as between federal and state authority in the matter of safety on the public highways, with the principle applying, presumably, that in cases of conflict federal authority is paramount. The consideration that 35 percent of petitioner's operations, or driver trips, consist of operations, or trips, in performing plant service—a private service—does not, it is believed, take from the Commission its authority over the maximum hours of the drivers of a carrier subject to the Act in performing that part of its operations, nor in respect of their qualifications. But the very fact that it does not, definitely raises the question of the propriety of including as a part of so-called "interplant trans-

portation", or "interplant trips," the operations, or trips, in performing plant service. Whatever the warrant for such inclusion in connection with the Section 3 (j) question,[2] above mentioned, the effect thereof in connection with the question here is different. For, the inclusion as a part of said "interplant transportation" of the plant service trips (Type B) along with the common carrier highway trips (Types A and D) in transporting intrastate freight has the appearance of inflating the number, or percentage, of trips subject to State authority and at the same time of diminishing the number or percentage of trips aligned as subject to Congress' safety legislation (see R. 49, 53).

Even assuming that the jurisdiction of the federal legislation is no greater in respect of the 35 percent of plant service trips or operations than

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[2] The analyses of driver trips, by including the trips in rendering plant service (Type B) as trips in performing "interplant transportation," treats them as trips of the same general class as the driver trips in transporting intrastate freight (Types A and D). For purpose of the particular question in issue here, such treatment of the Type B ignores the basic facts appearing in the stipulation itself, showing that such trips are not trips in the transportation of intrastate freight over the public highways. Cf. *Swift & Co.* v. *H. V. Ry.*, 243 U. S. 281, 286, 289. The issue here, involving as it does, a construction of Congress' legislation for promoting highway safety, is an issue affecting the general public interest and, therefore, it has seemed warranted and important to emphasize the discrepancy in the analyses so far as their use in connection with that issue is concerned.

that of the State, still the alignment of the plant service trips on the State authority side has like effect and a considerable one in the comparative percentage showings set out in the analyses of driver trips. While it is not believed that the Commission's jurisdiction depends upon the percentage of petitioner's operations and driver trips in interstate transportation, still, since the showing made by the analyses is predominantly a percentage showing, it seems necessary to refer to the effect of the alignment of plant service trips thereby made along with the description of the stipulation of facts and of the said analyses predicated thereon.

As above shown, the 35 percent of petitioner's operations described in subparagraph B, paragraph I of the stipulation is performed within the plants of the two steel companies, or between the mills of those companies. "In these operations, the (petitioner's) trucks often operate within the plant and without leaving the plant for several days." The operations consist of the "transportation from one mill or portion thereof to another" of steel for "further processing in the course of its manufacture." Such transportation, performed by petitioner, constitutes an integral part of the industrial operations of the steel companies—as much so as if the movements of steel were made by a conveyor or electric crane operated directly by the companies. Cf. *Chicago*

& A. Ry. v. *United States*, 156 Fed. 558, 561; *N. Y. C. & H. R. R. Co.* v. *General Electric Co.*, 114 N. E. 115, 118. Plainly, the petitioner, in rendering such service, is the mere agent of the companies, it, or its employees, performing the trucking movements of steel under the direction and control of the companies and presumably when, where and as needed in the industrial operations.[3]

Plant service such as petitioner motor carrier performs for the two steel companies is frequently performed by the railroads operating on and over the plant tracks of shipper industries. "Plant service is private service. Its distinguishing characteristic is that it is performed in the interest of particular shippers and that the facilities employed are not available or accessible to shippers generally." *A. T. & S. F. Ry.* v. *K. C. Stock Yards Co.*, 33 I. C. C. 92, 99. The service may

[3] In the rendering of the service, the petitioner is not left with the independence which is part of the attributes of a carrier. The steel which petitioner hauls "from one mill or portion thereof to another" is steel in the course of processing into finished products, namely, bumper stock, fender stock, etc. (R. 14, 48). That is to say, petitioner's Type B haulage is an integral part of the industrial operations in the sense that it is a real part of the plant operations, and it (or like haulage) is essential to the production of the articles which the two steel companies turn out as their finished products. It is as such subordinated agent that petitioner, in rendering the plant service, is the mere agent of the two subsidiaries of National Steel.

be performed by a common carrier or other public agency but the test as to whether it is private service is the character of the service rendered and not of the agency rendering it. *Idem; Crane Iron Works* v. *United States,* 209 Fed. 238, 243–244. A form of plant service familiar to the Court is that involved in the *Terminal Allowance* cases, *Ex Parte 104,* 209 I. C. C. 11, which have been involved in several of the Court's decisions, including *U. S.* v. *Wabash R. Co.,* 321 U. S. 403, 409–410. Broadly stated the question in those cases was whether the placement of cars on so-called interchange tracks at or near an industrial plant accomplished the delivery ending the transportation service or whether the industry was entitled to have the cars carried over plant tracks and "spotted" at designated unloading points. The administrative criterion or test determinative of the question is whether, under the operating conditions and related circumstances obtaining at a plant, the service entailed in such "spotting" of cars at desired unloading points is in excess of that involved in "spotting" cars on the carrier's team tracks or on ordinary industry spurs or side-tracks. *Am. Sheet & Tin Plate Co. et al.* v. *United States,* 301 U. S. 402, 409, 411. Where the Commission finds that the service involved in "spotting" cars at a plant is in excess of such criterion, or standard, its conclusions, generally

stated, are that the interchange tracks are reasonably convenient points for making delivery; that the "spotting" beyond is plant service for the industry and not common-carrier service covered by the line-haul rates; and that the performance thereof free (i. e., without charge in addition to the line-haul rates) constitutes the according of a preferential service not accorded to shippers generally and an in effect refunding or remitting of a portion of the published rates, all in violation of section 6 (7) of the Act. *United States* v. *Wabash R. Co., supra,* 410, 411.[4]

Another form of plant service often performed by the railroads for large industrial plants is so-called intraplant switching. In contrast to the plant service above described, this service is wholly disconnected from any preceding or succeeding road haul (*Crane Iron Works* case, *supra,* p. 244) and is thus irrefutably private service. In this respect it is like the plant service performed by petitioner for the two steel companies and, as there, it may consist of movements from one mill or portion thereof to another; or it may consist, for example, of movements of waste materials to dump piles or movements of coal, or ore, from stock piles to furnaces. When performing

[4] Cf. *Tank Car Corp.* v. *El Dorado Term. Co.*, 308 U. S. 422, 431–432, involving violation of Elkins Act.

such plant service—intraplant switching—the railroads exact, and commonly file with the Commission, so-called intraplant switching charges.[5] The service is, as stated, purely plant or private service, but similarly as in the case of "spotting", found to be plant service, its performance for a shipper free of charge would violate section 6 (7) of the Interstate Commerce Act and presumably the Elkins Act as well.

Accordingly, the authority and control which the Commission thus has over plant service—a private service—flows importantly from its authority and duty to enforce[6] section 6 (7) of the Act and the Elkins Act, the broad and well-known remedial purposes of which are to require rate uniformity and to put a stop to inequality of treatment in whatsoever form appearing. The question here is as to the scope of federal legislation of unquestionably equally broad and important purpose—the purpose of promoting safety on the public highways. The scheme of the legislation to that end is, it is apparent, directed to the controlling of that particular form of danger incident to the use of the public highways by motor carriers in transporting traffic practically

[5] See *Staley Mfg. Co. Terminal Allowance* case, 245 I. C. C. 383, footnote 6, p. 385. This report was involved in *U. S.* v. *Wabash R. Co.*, *supra*.

[6] In some cases by its own orders; in others directly through the courts.

of all kinds.[1] Of great importance to the program is the authority given the Commission to prescribe the qualifications of those employees of motor carriers who drive the vehicles—often of great size—and their maximum hours of service; and it is that authority which is directly involved here.

In *Ex Parte No. MC–2*, 11 M. C. C. 203, 205–206, the Commission refers to the operations of carriers transporting equipment for use in the oil fields which involve a situation not different in principle or substance from that involved here. After leaving the highways, the drivers of these carriers may for days "be engaged in work not connected with transportation." Such carriers "perform a service beyond that of merely transporting the property by motor vehicle," in that "they move derricks and oil-well machinery and supplies from one location to another," "erect the derricks, place the machinery and lay the pipe." The vehicles "are equipped with winches, cranes and other paraphernalia," and "the driver's principal duty is to operate" the same "in erecting the derricks, installing machinery and laying the

[1] Such transportation over the highways is a service of great importance to the commerce of the country, this being best evidenced by the thousands of motor carriers in operation in the country. Cf. *Gregg Cartage Co.* v. *U. S.*, 315 U. S. 74, 84. But the very fact that it is a service of great importance, furnished by thousands of carriers and their many vehicles, is the thing making Congress' safety program one of vital importance to the general public using the highways.

pipe" (p. 205). When oil or gas is struck, "it is necessary that the wells be capped and that pipes be laid to storage tanks and reservoirs, in order that large quantities of oil be not wasted" (p. 206). Answering the carriers' contention "that it would be impossible for them to perform the required service and at all times comply with the rule prescribing the weekly maximum on duty," the Commission said (p. 206):

> It must be borne in mind, however, that after the driver has worked for these long periods in the oil fields, he must drive the motor vehicle to the home terminal over the highways of the country. The testimony submitted by this class of carriers, that they have need for a longer weekly maximum than 60 hours, was persuasive. After careful consideration we have reached the conclusion that, important as these considerations are, they do not overcome our primary duty to prescribe maximum hours which will be reasonably safe. No adequate reason was shown for making a change in rule 3 (a) insofar as it affects this type of operation.

It will be seen that, in such operations, the work of the carriers and drivers, in the oil fields after leaving the highway, is (like the situation here) a real part of the oil company operations in producing the oil. Nevertheless, the rule as to weekly maximum on duty hours applied and the Commission did not believe that there was war-

rant for making any change. Petitioner's drivers used in performing the plant service here, are, it is apparent from the record (see Exhibit C–2, R. 26), also used without distinction, and as need arises in its common carrier highway driving both interstate and intrastate. One of the purposes of the weekly limitation on hours is to prevent that type of fatigue or exhaustion that is not readily recoverable from, and it is plain that could as surely result from excessive hours in performing plant service as in driving in common carrier service.

Whatever the number or percentage of petitioner's trips in transporting interstate freight over the highways, it is, as above stated, indisputably a common carrier by motor subject to the Interstate Commerce Act and the Commission's jurisdiction. There are very many motor carriers operating over the highways of the country whose interstate business, like that of petitioner's, constitutes a minor proportion of their whole business. Yet, in the aggregate, such interstate business represents a vast volume of interstate traffic carried over the highways in practically countless trucks and combination tractor-trailer vehicles. Also, there are many motor carriers which, like petitioner, perform plant service or other form of service outside the category of carrier transportation. Some of the States have clothed boards, or commissions, having jurisdic-

tion over motor carriers, with authority, like that of the Commission, over the qualifications and maximum hours of drivers. Others have acted in the matter by direct statutory provisions. But although some considerable uniformity has been brought about, it has by no means been achieved. 3 M. C. C. 665, 683–686; 23 M. C. C. 1, 14–21.

Moreover, while trips, or movements, in performing plant service are generally wholly within a State, they are not carrier movements in the intrastate transportation of freight. Doubtless State Boards, having authority over the intrastate transportation of a carrier, are able to indirectly control the hours of drivers performing plant service through their direct authority over the drivers' hours when driving in intrastate transportation over the highways. But, even assuming the Commission's authority over petitioner and its drivers in performing the plant service here was of the same limited sort, still there would be no warrant for showing, as in effect done by the exhibits, the driver trips in performing such service as subject to State authority. For in that case they would be as much subject to federal as to State authority.

However, any such assumption of like authority overlooks the fact that federal authority is paramount in the field occupied. The plant service is not intrastate transportation but private service. Petitioner is subject to the Act and to Congress'

legislation for promotion of safety on the highways and there is no reason to believe that it has not conferred full and effective authority over the hour of petitioner's drivers in performing the plant service.

The stipulation shows that during the regular course of its business in 1941, petitioner employed 14 garage workers, an unspecified number of which were mechanics (R. 11). Assuming that the painters and washers, referred to, did "nothing but paint the vehicles" or wash them, that is, did no work "which affects safety of operation directly" (*Ex Parte No. MC–2*, 28 M. C. C. 125, 133), the only garage workers of concern here are the mechanics. And, since the stipulation does not qualify the word in any way, it would seem that those garage workers must be considered to have been "mechanics" (*Idem*, 133).

ARGUMENT

In passing upon the question whether petitioner's drivers were exempted from Section 7 of the Fair Labor Standards Act by Section 13 (b) (1) thereof, the Circuit Court of Appeals says in its opinion (R. 52–53) that it had theretofore adopted the rule that a driver engaged in driving trucks both in interstate and intrastate commerce must, in order to come within the exemption, devote a substantial part of his time to driving in interstate commerce. As to the question

whether the showing as to petitioner's drivers met the test, the court says:

> It appears unnessary to attempt to answer that question definitely in this case, as the stipulated facts fail to show more than a very small proportion of time devoted to interstate transportation. The burden is on the employer to bring himself within the exemption. *Fletcher* v. *Grinnell Bros., supra.*

The Court had previously referred (R. 49) to the several precentage showings, appearing in the stipulation, of driver trips made in interstate commerce as compare with those made in "interplant transportation." The figures it sets out also disclose that petitioner and its drivers made 724 trips in 1941 in the interstate transportation of freight over the highways. The Court, however, although apparently conceding that by reason of such trips and its holding out, petitioner was a common carrier in interstate commerce subject to the Interstate Commerce Act, nevertheless, devotes no discussion to that fact or to the effect or import of its decision on Congress' legislation for promotion of highway safety. As already pointed out, there are very many motor carriers subject to the Act whose interstate business is a minor part of their traffic, and yet, in the aggregate, such business constitutes a vast volume of interstate traffic carried over the highways of the country in a continuing stream of vehicles. With

the exception perhaps of carriers whose interstate business is so insignificant in volume that "the Courts would apply the maxim *de minimis*" (Cf. *Labor Board* v. *Fainblatt*, 306 U. S. 601, 607), it seems clear that any rule excluding from Congress' safety legislation carriers in fact operating interstate would operate greatly, or in any event most "substantially" to defeat that legislation. Moreover, the suit here is not for recovery of past overtime wages claimed to be due but is one for an injunction operating *in futuro*. It is reasonable to expect that motor carriers engaged in interstate commerce will make every effort to increase their business with the result in many cases of progressive increases in their interstate business and traffic moving over the highways.

The guide here is the remedial purpose of Congress' highway safety legislation and not that of the Fair Labor Standards Act. *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 657, 677. And the question in issue here is not whether a substantial part of the activities of the drivers affect safety but is whether, or to what extent, the Federal safey legislation has, in its operation on interstate motor carriers, superseded the authority of the States. That is not to say that, in the case of drivers, the question of whether a substantial part of their activities affect safety might not prove to be one of importance (*Idem*, 677). But here neither the Circuit Court of Appeals nor

respondent question either that a substantial part of the drivers' activities affected safety or that a substantial part of their time was spent in safety work. In fact, it must be concluded that the record affirmatively and forcibly shows that a substantial part of the drivers' activities did greatly affect safety. The record showing is in the form of driver trips—thousands of driver trips in transporting freight over the highways. So far as driver-employees are concerned, it may be said, that every moment of their time while driving over the highways obviously affects safety (*Idem*, 678). That is matter of common knowledge.

The decision of the Circuit Court of Appeals does not dispute this. The effect of the decision is that, while the court accepts the fact that the driver's trips—all of them—affected safety, it holds that the record fails to show that that part, or proportion, of the trips, or driver time, devoted to interstate driving was sufficient to meet the rule (adopted in earlier cases) that, where drivers of trucks drive both interstate and intrastate, they must, in order to come within the exemption from the Labor Standards Act, devote a substantial part of their time to interstate driving. "The burden," the court says, "is on the employer to bring himself within the exemption" (R. 53).

Although, in the above, the Court to a certain extent recognizes that the question is one of jurisdiction as between federal and state authority in

the matter of safety on the highways, nevertheless it is entirely clear that its decision mostly hinges on the thought that, in any application of the exempting provisions of section 13 (b) (1) of the Fair Labor Standards Act, the remedial purpose of the latter Act should be looked to and, therefore, that the said exempting, or excepting, provisions should be narrowly construed and interpreted. See cases cited in support, including *Fletcher* v. *Grinnell,* 150 F. (2d) 337, 340. But, as stated in the *Levinson* case, *supra,* p. 682, while generally an expansion of the jurisdiction of the Labor Standards Act does not conflict with jurisdiction established under other Acts of Congress, "here every expansion of jurisdiction of the Act through interpretation of section 13 (b) (1) cuts down the jurisdiction of the Commission under section 204 of the Motor Carrier Act."

As above shown, the Circuit Court of Appeals, in concluding that petitioner's drivers did not come within the exemption of section 13 (b) (1) of the Labor Standards Act, did not support the conclusion by any express holding as to the status of the drivers under section 204 of the Motor Carrier Act. It simply referred to, and relied on, its rule that, in order to come within the exemption, such drivers must be shown to have devoted a substantial proportion of their time to interstate driving, the court adding that the "burden is on the employer to bring himself within the exemp-

tion." But any conclusion that employees do not fall within said exemption must, or should, of course, be bottomed on the holding that they are not employees with respect to whom the Commission has power to prescribe qualifications and maximum hours of service pursuant to section 204 of the Motor Carrier Act. And, in arriving at such holding, the sole guide is the language and remedial purpose of the Motor Carrier Act, which embodies Congress' legislation for promotion of safety on the highways. *Levinson* case, *supra*, p. 677; *Southland Co.* v. *Bayley*, 319 U. S. 44, 48–49. It follows that the remedial purpose of the Labor Standards Act is not the guide and also that the burden of establishing his case remains with a plaintiff and that the burden is not on an employer to bring himself within the exemption.

Accordingly, the basic question in issue is, as above stated, whether, or to what extent, Congress' legislation for promotion of highway safety has, in its operation on motor carriers subject to its jurisdiction, superseded the authority of the States. "The need for uniformity in the matter of qualifications and maximum hours of employees is patent (*Ex Parte No. MC–4*, 1 M. C. C. 1), and there is nothing in the legislation to indicate other than that Congress intended to exercise the full authority it possessed. In connection with the scope of its authority, important general considerations, it would seem, are the great changes

which in comparatively recent years have taken place in highway transportation and travel; that these changes, particularly in the main highways, have in important measure been brought about by federal aid, both by grants of money and expert advice and supervision; and that, as a result of the changes, interstate use of the public highways has been greatly stimulated, not only by motor carriers, but by the general public traveling in private vehicles. See generally, *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U. S. 405, 416 et seq.; *Maurer* v. *Hamilton*, 309 U. S. 598, 604–605; *S. C. Highway Dept.* v. *Barnwell Bros.*, 303 U. S. 177, 184. That the federal government's responsibility has kept pace with these changes seems a logical and necessary conclusion and also that the federal highway safety legislation was enacted to meet such responsibility.

It has been above emphasized that the Circuit Court of Appeals, in concluding that petitioner's drivers did not come within the exempting provisions of the Labor Standards Act (that is, were not employees with respect to whom the Commission's authority attached), based its conclusion on the holding that it was not shown that a substantial part of their time had been devoted to driving in interstate transportation. This test, or criterion, the court used in the view that the exemption should be narrowly interpreted and applied, citing *Fletcher* v. *Grinnell, supra*, p. 340.

But the effect of thus narrowly interpreting the exemption in section 13 (b) (1) was to expand the jurisdiction of the Labor Standards Act, and, as pointed out by this Court in the *Levinson* case, *supra*, p. 682, "every expansion of jurisdiction of that Act through interpretation of section 13 (b) (1) cuts down the jurisdiction of the Commission under section 204 of the Motor Carrier Act."

However, the Circuit Court of Appeals was in error in narrowly interpreting the exemption, thereby cutting down the Commission's jurisdiction, from which it follows that the criterion it used was without sound support, that is, the criterion that, in order that drivers be exempt from the Labor Standards Act and within the Commission's jurisdiction, it must be shown that a substantial part of their time was devoted to driving in interstate transportation.* Shorn of interpretations reached under the misconception that the remedial purpose of the Labor Standards Act must be looked to, the Commission's juris-

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*This criterion, it will be noted, is different from that held erroneous in the *Levinson* case, *supra*, namely, the criterion of whether an employee devotes a substantial part of his time to work affecting safety. Nevertheless, the criterion used by the court, adopted, as it was, in the view that the remedial purpose of the Labor Standards Act had to be given effect, is entirely without sound support and also runs counter to the rule that, in cases of conflicting State authority, federal authority is paramount.

diction to carry out Congress' legislation to promote safety on the highways is left to the language of that legislation and, in giving effect thereto, there seems no good reason why the authority with which it clothes the Commission should not be considered to be commensurate with the task the Commission must effectively carry out and the importance the Commission has always assigned to it, beginning with *Ex Parte MC–4*, 1 M. C. C. 1.

Although the greater part, or proportion, of petitioner's common carrier highway transportation is intrastate, its status as a carrier subject to the Act is not, and cannot be, disputed. The Commission's jurisdiction over traffic moving interstate does not depend on volume; for, as to the matters dealt with by the Act, the Act's jurisdiction and Commission authority thereunder is paramount. Accordingly, the least that can be said, it would seem, is that petitioner's trips, performed through its drivers, in interstate transportation over the highways, could not properly be disregarded because constituting a minor part of its total transportation or because not viewed by the court (in a particular case covering a particular period of time) as being of substantial volume. Each and all such trips in interstate highway transportation, and the drivers performing them, are definitely subject to the Act, even though, in conducting the business from

day to day coming to petitioner, there results a commingling of the use of drivers in intrastate, and interstate driving. Cf. *Ex. Parte No. MC–3*, 23 M. C. C. 1, 39.

DRIVER TRIPS

As explained in the preliminary statement (pp. 19–20, *supra*), the stipulated analyses of driver trips are, so far as the issue here is concerned, faulty in the respect that they have the effect of inflating the number, or percentage, of trips aligned under State authority and of diminishing the number, or percentage, of trips aligned under the Commission's authority. On the one side of the exhibits (R. 24–27) are shown the trips in transporting interstate freight and on the other the trips in performing so-called "interplant transportation," which later includes, not only the trips in transporting intrastate freight (Types A and D), but also the trips in performing plant service (Type B). The plant-service trips are not separately shown, but they appear to have constituted 35 percent of petitioner's total operations in 1941 (R. 12).

Plant service is not carrier transportation and, therefore, the trips in performing the same are not properly aligned (along with the intrastate highway trips) as subject to State legislation conferring authority on State Boards, or operating directly, as to the qualifications and or

maximum hours of service of the drivers of motor carriers operating on the public highways. Congress' legislation for promotion of highway safety is aimed, it is apparent, at that particular form of danger incident to the carriage of much of the country's commerce by motor carriers operating over the public highways.—The legislation implements its objective in important measure by clothing the Commission with authority over the qualifications and maximum hours of the motor carriers' drivers, and in the field thus occupied the federal legislation is paramount. Although plant service is private service, the Commission's authority over petitioner's drivers' qualifications and hours are within the power conferred.

In cases where the railroads, operating over plant tracks, perform plant service for shipper industries, the Commission is vested with authority to see to it that they exact proper and reasonable charges, this to prevent preferential service and rebating violative of the broad and important purposes of section 6 (7) of the Act and the Elkins Act to ensure uniformity of rates and to put a stop to inequality of treatment of whatsoever kind or sort. The Commission is enabled to act in the matter, not because the plant service is subject to its jurisdiction but through its authority over the carrier. Congress' legislation to promote safety on the public highways is certainly of equal importance and scope; and, simi-

larly in cases of plant service performed by motor carriers, the Commission is enabled to act in the premises, not because the plant service is subject to its jurisdiction, but through its authority to forbid the carriers to require or permit their drivers to work hours in excess of those ensuring that they will be in proper physical and mental condition when called upon to drive on the highways.

The effect of the alignment by the exhibits, as under State, instead of Commission, authority, of the 35 percent of petitioner's total 1941 operations consisting of plant service, or trips, is, of course, considerable. And this is not a matter solely of the number, or percent, of trips placed under State authority as compared with the number, or percent, thereof placed under Commission authority, but affects more importantly the showing made by Exhibit C–2 (R. 26–27) of the "percentage of weeks, by employees, in which the latter were exclusively engaged in "interplant transportation'." However, while it is entirely plain that the 35 percent of total trips in plant service should in some way be eliminated [9] from the State

[9] Exhibit C–2 shows (R. 16, 26–27) that all of petitioner's drivers except two "were exclusively engaged in 'interplant hauling' during the greater part (50 percent or more) of the workweeks in 1941." Since such "interplant hauling" is about 36.3 percent made up of hauling in performing plant service, it is evident that some adjustment must be made to confine the showing to highway hauling in the intrastate

authority side, it does not follow that they should be added to the Commission authority side as carrier trips in the transportation of interstate freight. For one thing, such trips, or movements in plant haulage, do not seem comparable to so-called road-haul trips in transporting freight and it is, of course, recognized that they are not trips affecting safety on the highways, save in the respect that excessive hours would affect such safety. Nevertheless, the Commission has full authority over the driver hours spent in plant haulage and that consideration should be kept in mind in any weighing of Federal and State authority.

But, even accepting Exhibit C–2 as it stands, it will be seen that, in 1941, all except 2 of the 43 drivers, made trips in transporting interstate freight and that those two were in the employ of

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transportation of freight. Fully appreciating that the result is but a rough approximation, the best that can be done with the material at hand is to reduce by 36.3 percent the percentage of weeks in which, as shown by the Exhibit, the drivers were exclusively engaged in "interplant transportation." Based on that adjustment, the showing is that about one-half of petitioner's drivers were exclusively engaged in the intrastate transportation of freight during 50 percent or more of the workweeks in 1941. Exhibit C–2 (R. 16, 27) also shows that the "average employee" was exclusively engaged in "interplant transportation" during 75.6 percent of the workweeks in 1941. If the 75.6 percent figure is reduced by 36.3 percent, the showing is that the "average employee" was exclusively engaged in intrastate transportation of freight 48.1 percent of the workweeks.

petitioner for only about half the year. The showing is by workweeks and, as to certain of the drivers, it is shown that there were a good many weeks in which they made one or more interstate trips; as to others the weeks shown are fewer and, taken as a whole, the showing is of a varying number of weeks during which the drivers made one or more interstate trips. From this and from the very handling of the exhibits and evidence, it is made plain that any of the drivers might, as need arose, be called on to drive in the transportation of interstate freight. The Act, of course, imposes no duty to assign particular drivers to interstate transportation but leaves the matter to managerial discretion save that they must be qualified and are subject to the prescribed maximum "on duty" hours. In this latter connection, it should be kept in mind that, as distinguished from the workweek used in the exhibits, the Commission uses the so-called "sliding week," that is, it "imposes on a 'driver' a maximum total of 60 hours of service 'on duty' of any kind in a 'week' of 168 consecutive hours" * * * *Levinson* case, *supra*, 675; *Ex Parte MC–2*, 6 M. M. C. 557, 563.

In *Ex Parte No. MC–3*, 23 M. C. C. 1, 39, the Commission said:

> We recognize, as a practical matter, that private carriers transport property both in interstate and intrastate commerce. The

same motor vehicle, operated by the same driver, on 1 or 2 days in a week may be engaged in transporting property in interstate commerce and the rest of the week may be engaged in intrastate commerce. In our opinion if a driver operates a motor vehicle in the transportation of interstate or foreign commerce on any day of a given week, such driver is subject to the weekly maximum herein prescribed. Likewise if a driver employed by a private carrier of property is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum herein prescribed. If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations herein prescribed during that week. * * *

We realize that there are other types of operations not specifically covered by what we have said above. We believe, however, that the principles herein referred to will make it less difficult for a private carrier to determine when a driver is subject to the regulations herein prescribed.

It will be seen from the above that the Commission, with the consideration fully in mind that a driver might, in the same week, drive both in interstate and intrastate transportation, yet found it necessary to conclude that, if a driver drove in interstate transportation at any time in a

given week he was subject to the Commission's regulations for the entire week. By this the Commission recognizes that, to effectively carry out Congress' legislation, it is necessary to trench on State authority to the extent stated and that the federal legislation is paramount. Whether in circumstances seeming to require a further extension of authority for effective administration, the Commission would rule that the matter was within its authority, counsel does not know. But, having in mind that the question of the scope of Commission authority under the legislation is a legal question for the Court, it is considered that the statute, as applying to the situation and circumstances in the present case, should be presented to the best of counsel's ability.

It is apparent from the evidence and exhibits that, without going beyond the Commission's ruling, the hours of service of petitioner's drivers and their qualifications would to a large extent be subject to the Commission's regulations. To that extent, whether constituting a minor or major extent, the regulations would at least have to be enforced. Yet, as very vividly portrayed by the analyses of the trips of petitioner's 43 drivers, and having in mind the "sliding week" used by the Commission and necessary to give effect to the safety legislation, the weeks as to which Commission authority over the various drivers attached and those as to which State authority attached,

and also the hours spent in plant service, would be so commingled that effective carrying out of the regulations and Congress' legislation would be impracticable except as authority was exerted over petitioner's drivers when driving intrastate. As said by this Court in *Wisconsin R. R. Comm.* v. *C. B. & Q. R. Co.*, 257 U. S. 563, 588, and speaking of an analogous situation of commingled federal and State authority:

> Effective control of the one must embrace some control over the other in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them.

To the same effect see *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119, 121; *Wickard* v. *Filburn*, 317 U. S. 111, 118, and *United States* v. *New York Central R. Co.*, 272 U. S. 457. In the latter case the Court said (p. 464):

> The Commission having jurisdiction over the carriers and the facilities by which the transportation is carried on, the question is narrowed to whether its jurisdiction extends to the entire current of commerce flowing through this terminal although intrastate in part. When we consider the nature and extent of the commingling of interstate and intrastate commerce, and the difficulty of segregating the freight passing through the terminal, we think it clear that Congress in employing such broad language as "the Commission shall have

full authority to determine and prescribe the terms and conditions upon which these connecting tracks shall be operated" intended to confer upon the commission power to regulate the entire stream of commerce. Where, as here, interstate and intrastate transactions are interwoven, the regulation of the latter is so incidental to and inseparable from the regulation of the former as properly to be deemed included in the authority over interstate commerce conferred by statute. This was the view of the state court. (Citing cases.) An interpretation of the statute which would in practice require the segregation of all shipments in interstate commerce, would make compliance with the commission's orders impossible and defeat the purpose of the Act.

In connection with the reference in the above to the broad language of the Act conferring authority on the Commission with respect to rail and barge connections, mention should be made of the similarly broad language of Section 204 of the Motor Carrier Act, conferring on the Commission authority over the qualifications and maximum hours of employees of motor carriers subject to the Act. And it is also true that Congress had particularly in mind the driver-employees of motor carriers. *Southland Co.* v. *Bayley*, 319 U. S. 44, 48; *U. S.* v. *Amer. Trucking Asso.*, 310 U. S. 534, 547. It will be noted, too, that, in the *Wisconsin Commission* case, *supra*, the fact is re-

ferred to that both interstate and intrastate passengers are carried in the same cars. Whether petitioner's vehicles at times carry both interstate and intrastate freight is not shown, but that that is very frequently true in cases of motor carriers operating both interstate and intrastate is well known and, where it is true, such situation, of course tends still further to confuse the question of Commission or State Board (or statute) authority over the drivers' hours and their qualifications as well. Cf. *Baltimore & O. R. R.* v. *Int. Com. Comm.*, 221 U. S. 612, 618, 619; *San Pedro, L. A. & S. L. R. Co.* v. *United States*, 213 Fed. 326, 328.[10]

In the two decisions last cited the highly remedial character of the Hours of Service Act is referred to and the fact that it should, therefore, be given liberal construction and application. In the *Levinson* case, *supra*, p. 658, 659, the Court emphasized that Congress' legislation for promotion of safety on the public highways was similarly highly remedial and, as demonstrating Congress' intention that it be given full scope, pointed to the fact that, while Section 203 of the Motor Carrier Act contained many exemptions from the Act's general provisions, it significantly in each case excepted the safety provisions from the ex-

[10] See *Southern Ry.* v. *R. R. Comm., Indiana*, 236 U. S. 439, and *U. S.* v. *Southern Ry.*, 222 U. S. 20, both relating to Safety Appliance Act.

emptions. Another thing showing Congress' intention that its safety legislation cover the widest field within its authority is that, while private carriers are not brought within the Act in other respects, the safety provisions are made applicable to them as well as common and contract carriers.

MECHANICS

The stipulation shows that during the regular course of its business in 1941, petitioner employed 14 garage workers, an unspecified number of which were mechanics (R. 11). The stipulation does not qualify the word "mechanics" and, therefore, the word, as used, must, it is believed, be taken to mean full-time mechanics. If, on the other hand, this view is wrong, the question of whether a substantial part of their activities affected safety would be important. *Levinson* case, *supra.* Since, however, in the latter case, a substantial part of Levinson's activities were shown to affect safety, the question was, it is understood, left open as to whether where some, but less than a substantial part, of an employee's activities affect safety, he is brought within the Commission authority and exempted from Section 7 of the Fair Labor Standards Act. *Pyramid Motor Corp* v. *Ispass,* 330 U. S. 695, 708–709.

The Circuit Court of Appeals has apparently disposed of the question of whether petitioner's

mechanics were exempt from Section 7 of the Labor Standards Act along with the drivers, that is, on the ground that a substantial part, or proportion, of their time was not devoted to work affecting interstate commerce. At least the Court does not discuss the status of the mechanics separately. But this treatment of the mechanics brings to mind the question of whether, if only a substantial part of the mechanic's activities affected safety, would it also have to be determined what proportion thereof affected interstate commerce. It is not believed that it would because the principles governing federal versus State authority are settled. But even assuming that the status of a part-time mechanic depends only on whether a substantial part of his activities are devoted to safety work, still the question of jurisdiction over him would be left to a criterion subject to varying interpretation, making for difficulty in administration and enforcement of the Act. As matter of historical usage under the Interstate Commerce Act, while as to questions of administrative judgment, Congress has used the criterion of "substantiality," questions of jurisdiction have been left to more definite tests. And, to consider that it has done so here, would, it is believed, be in accord with the decision in *Labor Board* v. *Fainblatt, supra.*

But, in any event, the stipulation, in using the word "mechanics," does not in any way qualify

the same. The Commission's report in *Ex Parte MC–2*, 28 M. C. C. 125, 138, shows that mechanics generally devote a large part of their time to activities directly affecting safety. The burden, it would seem, was on respondent to show that that was not the case as to the mechanics here. The Circuit Court of Appeals was wrong in its view that the exemption (sec. 13 (b) (1)) in the Fair Labor Standards Act should be narrowly construed and wrong, too, it is believed, in its holding that the burden was on petitioner to bring himself within the exemption.

Respectfully submitted.

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Interstate Commerce Commission.

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SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1947.

James F. Morris, Petitioner,
v.
William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 17, 1947.]

Mr. Justice Burton delivered the opinion of the Court.

This case requires further application of the principles stated in *Levinson* v. *Spector Motor Service*, 330 U. S. 649, and *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695. The first question is whether the Interstate Commerce Commission has the power, under § 204 of the Motor Carrier Act, 1935,[1] to establish qualifications and maximum hours of service with respect to drivers and mechanics employed full time, as such, by a common carrier by motor vehicle, when the services rendered, through such employees, by such carrier, *in interstate commerce*, are distributed generally throughout the year, constitute 3% to 4% of the carrier's total carrier services, and the performance of such services is shared indiscriminately among such employees and mingled with their performance of other like services for such carrier *not in interstate com-*

[1] "Sec. 204 (a) It shall be the duty of the Commission—

"(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment. . . ." 49 Stat. 546, 49 U. S. C. § 304 (a) (1).

merce. The other question is whether, if the Commission has that power, the overtime requirements of § 7 of the Fair Labor Standards Act of 1938 [2] apply to such employees in view of the exemption stated in § 13 (b) (1) of that Act.[3] We hold that the Commission has the power in question and that the overtime requirements of § 7 of the Fair Labor Standards Act therefore do not apply to such employees.

This action was brought March 26, 1942, in the United States District Court for the Eastern District of Michigan by the Administrator of the Wage and Hour Division, United States Department of Labor, under § 17 of the Fair Labor Standards Act,[4] to enjoin the petitioner, James F. Morris, from violating § 15 (a) (1) and (2) of that

[2] "SEC. 7. (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during the second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed. . . ." 52 Stat. 1063, 29 U. S. C. § 207 (a).

[3] "SEC. 13. . . .

"(b) The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; . . ." 52 Stat. 1068, 29 U. S. C. § 213 (b) (1).

[4] "SEC. 17. The district courts of the United States . . . shall have jurisdiction, for cause shown, and subject to the provisions of section 20 (relating to notice to opposite party) of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, as amended (U. S. C., 1934 edition, title 28, sec. 381), to restrain violations of section 15." 52 Stat. 1069, 29 U. S. C. § 217.

Act[5] through failure to pay his employees compensation for overtime in accordance with § 7 of that Act.[6] After a trial based on the pleadings and stipulated facts, the complaint was dismissed September 26, 1945. In its unreported conclusions of law the court stated that neither the petitioner nor his employees were engaged "in the production of goods for commerce" within the meaning of the Fair Labor Standards Act and that, to the extent that they might be considered to be engaged "in commerce" within the meaning of that Act, the requirements of its § 7, as to compensation for overtime, did not apply to them. The Circuit Court of Appeals for the Sixth Circuit reversed this judgment May 29, 1946, and remanded the case for further proceedings. *Walling* v. *Morris*, 155 F. 2d 832. Because of its importance in interpreting the Motor Carrier Act and the Fair Labor Standards Act and because the question first stated above had not been passed upon in our decisions in the *Levinson* and *Pyramid* cases, *supra*, we granted certiorari, April 7, 1947, limited to the following question:

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[5] "SEC. 15. (a) . . . , it shall be unlawful for any person—

(1) to transport, offer for transportation, ship, deliver, or sell in commerce, or to ship, deliver, or sell with knowledge that shipment or delivery or sale thereof in commerce is intended, any goods in the production of which any employee was employed in violation of section 6 or section 7, or in violation of any regulation or order of the Administrator issued under section 14; except that no provision of this Act shall impose any liability upon any common carrier for the transportation in commerce in the regular course of its business of any goods not produced by such common carrier, and no provision of this Act shall excuse any common carrier from its obligation to accept any goods for transportation;

(2) to violate any of the provisions of section 6 or section 7, or any of the provisions of any regulation or order of the Administrator issued under section 14; . . . ." 52 Stat. 1068, 29 U. S. C. § 215.

[6] See note 2, *supra*.

"2. Where such employees [*i. e.*, those of a common carrier for hire who conducts a general cartage business] during a minority of their time are engaged in the transportation of interstate traffic are they exempt under the provisions of Section 13 (b) (1) of the Act from the maximum hours provision of Section 7 of the Act as employees with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act, 1935 (49 U. S. C. sec. 301, et seq.)?"

In response to our invitation, the Interstate Commerce Commission filed a brief *amicus curiae*.

The material facts are treated by the parties as being those shown by the record to have been in effect when the complaint was filed in 1942. They may be summarized as follows:

The petitioner then was, and for the past 12 years had been, the sole owner and proprietor of the J. F. Morris Cartage Company which operated a general cartage business as a common carrier by motor vehicle in and about the metropolitan area of Detroit, Michigan, and all within three contiguous counties of that State. His operations were centralized at Ecorse, Michigan, at his garage and yard, used for a dispatching office, general maintenance and repair garage and storage space for equipment.

His principal business was the transportation of steel. In the regular course of his business, in 1941, he generally employed about 60 persons, 40 as truck drivers, 14 as mechanics, painters, washers and repairmen in the garage, three as dispatchers and three as general office workers. His equipment consisted of about 50 trucks or tractors and 60 trailers.

He was prepared to and did render general cartage service to the general shipping public. In 1941, he rendered such service to 47 consigning firms, but about 97% of his revenue came from the Great Lakes Steel Corporation and

the Michigan Steel Corporation, both in Ecorse. His general cartage services, in 1941, were made up of three intermingled types of service, generally classifiable as follows on the basis of the revenue derived from them: (1) 35%: Transportation of steel largely within steel plants. This was transported for further processing in those plants and an unsegregated portion of it was shipped ultimately in interstate commerce. (2) 61%: Transportation between steel mills and industrial establishments. These shipments consisted principally of bumper stock, fender stock and other types of steel used in connection with the manufacture of automobiles, a substantial portion of which entered interstate commerce. (3) 4%: Transportation of miscellaneous freight directly in interstate commerce, either as part of continuous interstate movements or of interstate movements begun or terminated in metropolitan Detroit.[1]

[1] This activity is described as follows:

"C. Approximately three (3) per cent of the defendant's operations consists of the transportation of freight between the plants of the Great Lakes Steel Corporation and the plants of the Michigan Steel Corporation on the one hand, and, on the other hand, interchange points, such as boat docks, railroad depots, freight terminals and truck terminals lying in the Detroit Metropolitan Area, wholly within the boundaries of the State of Michigan, involving the picking up of freight from or the delivery of freight to water carriers, railroad carriers and line haul motor carriers, which freight either has moved across the Michigan State lines or is about to move across the Michigan State lines in continuous transportation through connection between the defendant and such other interstate carriers. The defendant's compensation for his portion of the through transportation service is in some instances paid to him by the interstate carrier, the compensation representing a division of the through rates on the transportation movement, and other instances being compensated by the shipper."

"E. Approximately one (1) per cent of the defendant's operations consists of the transportation of miscellaneous freight in general

Ever since § 7 of the Fair Labor Standards Act took effect, October 24, 1938, petitioner's employees, with the exception of his office workers, consistently worked enough hours to entitle them to additional compensation at the rate of one and one-half times their regular wages if such Section were applicable to them. They were, however, paid on the assumption that the Section did not apply to them and, therefore, for the most part, received only their regular rate of pay for such overtime. Accordingly, if it is found that § 7 is applicable to them, there is ground for an injunction against its further violation. No issue is presented here as to the office workers because there is no proof of overtime services having been rendered by them or being now in prospect. No issue is presented here as to the dispatchers. The Circuit Court of Appeals held that § 7 applies to them as employees engaged in the production of goods for interstate commerce and that they are not exempt as administrative employees. Those issues, however, are not within the limited grant of certiorari. As to the garagemen and laborers, including mechanics, painters, washers and repairmen, together with their superintendent of maintenance, there is no issue presented here, except to the extent that such classifications include mechanics doing the class of work defined as that of "mechanics" in *Ex Parte No. MC-2*, 28 M. C. C. 125, 132, 133,[8] including

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cartage service for hire and for shippers other than Great Lakes Steel Corporation or Michigan Steel Corporation. Cartage in this category is of the same physical character as that described in subparagraphs A, C, and D above, except that it is done on behalf of and for the account of shippers other than Great Lakes Steel Corporation and Michigan Steel Corporation."

[8] "(1) *Mechanics and other garage workers.*—The evidence is clear that carriers that do not operate approximately 10 motor vehicles or more cannot economically employ mechanics to do repair work, and they do not do so. . . .

"The larger carriers, however, do employ mechanics whose primary duties are to keep the motor vehicles in a good and safe working

the making of mechanical repairs directly affecting the safe operation of motor vehicles. All of the garagemen and laborers, except their superintendent of maintenance, were paid for their overtime work at "straight" or regular hourly rates. He was paid a weekly wage, and received no overtime pay, although he devoted approximately 25% of his time to the performance of routine physical tasks of the same general character as those of the employees working under his direction. The Circuit Court of Appeals held that the superintendent of maintenance was

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condition. They are required, for example, to keep the lights and brakes in such condition. They perform many other duties, of course, but these are sufficient to show clearly that the duties of these employees do affect safety of operation directly, as it is obvious that a large motor vehicle without the required lights or adequate brakes is a great potential hazard to highway safety. All witnesses testifying at the hearing agreed that the work of mechanics has such a direct and intimate relation to safety of operation, and no conflicting evidence was submitted.

"Our conclusion is that mechanics devote a large portion of their time to activities which directly affect the safety of operation of motor vehicles operated in interstate or foreign commerce, and hence that we have power to establish qualifications and maximum hours of service for such employees under said section 204 (a).

"There are other garage employees who do not perform work which affects safety of operation directly. Some carriers employ men who do nothing but paint vehicles. Others employ carpenters, and some few employ tarpaulin tailors. We find that the work done by none of these employees affects safety of operation.

"It is possible, although the record does not clearly establish the fact, that some of the larger carriers employ men whose sole duty is to see that the motor vehicles are properly supplied with oil, gas, and grease, or to wash the vehicles. In the majority of cases, undoubtedly, the mechanics perform this work. However, if there be employees who do nothing but oil, gas, grease, or wash the motor vehicles, we find that they do not perform duties which directly affect the safety of operation and are not subject to our jurisdiction. To make our finding in this regard entirely clear, it is that mechanics are the only garage workers we find subject to our jurisdiction." *Ex Parte No. MC-2*, 28 M. C. C. 125, 132, 133.

not exempt as an executive or administrative employee and should be classified in the same manner as the others in this group. There is nothing in the record showing the extent to which the respective garagemen and laborers devoted themselves to the several classes of work above mentioned and, if this were an action to recover overtime compensation for individual employees, it would be necessary to determine that fact. However, as this is an action only for an injunction relating to future practices, the situation can be met by limiting the injunction to the appropriate classifications of workers. On this basis, the injunction against violation of § 7 of the Fair Labor Standards Act may be issued as to those garagemen and laborers who are not "mechanics" as defined by the Interstate Commerce Commission, and the issue before us is limited to the proper application of such an injunction to such "mechanics."

The drivers are full-time drivers of motor vehicles well within the definition of that class of work by the Commission if the work is done in interstate commerce.[9] From October 24, 1938, to August 1, 1940, the drivers received their "straight" or regular hourly rate of pay for all overtime work. Since August 1, 1940, their overtime work has been paid for in accordance with a collective bargaining agreement in force as to union drivers, throughout metropolitan Detroit, employed either in intrastate or interstate general cartage. From August 1, 1940, to August 1, 1941, these agreements required payment of overtime in excess of 52 hours a week at one and one-half times the regular rate. After August 1, 1941, as a concession to wartime conditions, this additional rate was applied only to overtime in excess of 54 hours a week. The statutory workweek which would be applicable under § 7 of the Fair Labor Standards Act

[9] Safety Regulations (Carriers by Motor Vehicle), 49 CFR Cum. Supp., Parts 190–193.

at all times has been substantially shorter than those just mentioned.[10]

As to these drivers and these "mechanics" whose work affects safety of transportation, the first question here, as in the *Levinson* case, is whether the Commission has the power, under § 204 of the Motor Carrier Act, to establish qualifications and maximum hours of service with respect to them. The special situation presented is that, on the average, only about 4% of their time and effort has been, or is likely to be, devoted to services in interstate commerce. The issue would appear in its simplest form if each driver were required, each day, to devote 24 minutes (*i. e.*, 4% of his allowable daily aggregate of ten hours driving time) to driving in interstate commerce. The question then would be whether the Commission has the power to establish his qualifications and maximum hours of service in view of the relation of this driving to safety of operation in interstate commerce. Under the tests of the Commission's power, as approved in both the majority and minority opinions in the *Levinson* case, and, under the analysis of that power developed by the Interstate Commerce Commission and cited in that case, it is "the character of the activities rather than the proportion of either the employee's time or of his activities that determines the actual need for the Commission's power to establish reasonable requirements with respect to qualifications, maximum hours of service, safety of operation and equipment."[11] It is beyond question that, under such circumstances, § 204 (a) (1) of the Motor

[10] See note 2, *supra*.

[11] *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 674–675.

"For, factually speaking, not the amount of time an employee spends in work affecting safety, but what he may do in the time thus spent whether it be large or small determines the effect on safety. Ten minutes of driving by an unqualified driver may do more harm on the highway than a month or a year of constant driving by a qualified one." *Id.*, dissenting opinion, at p. 687.

Carrier Act [12] has authorized the Commission to establish reasonable requirements with respect to qualifications and maximum hours of service of such drivers. The Fair Labor Standards Act, which was passed three years later, has recognized and does not restrict the Commission's power over the safety of operation under the Motor Carrier Act. What is thus true for the driver is true also for the mechanic who repairs his truck.

In the record before us, instead of 4% of the driving time of each driver being devoted each day to interstate commerce without relation to what the driver does at other times, the parties present the actual experience of the petitioner and his drivers throughout 1941. The printed record, together with an unprinted exhibit filed with the Clerk, classifies all of the 19,786 trips taken in 1941 by the 43 drivers who respectively drove motor vehicles for the petitioner during not less than eight weeks in that year. Only the "Pickup Trips" and "Boat Dock Trips" are counted as being in "interstate commerce." These involved movements of goods to or from railroad freight houses, line haul motor carrier depots or the boat docks of the several steamship companies in Detroit. It was stipulated that the petitioner was "engaged as a common carrier for hire in the local transportation of property by motor vehicle," was "engaged in a general cartage business and . . . [was] prepared to render such services to the general shipping public." Each driver appears to have been a full-time driver during each week that he worked. The tables show 464 "Pickup Trips" and 260 "Boat Dock Trips," or a total of 724 made in interstate commerce, when and as required by petitioner's consignors. These constituted 3.65% of the petitioner's total trips. They were not distributed equally to each driver nor on the basis of 4% of his time each day. However, apparently in the normal operation of the business, these

[12] See note 1, *supra*.

strictly interstate commerce trips were distributed generally throughout the year and their performance was shared indiscriminately by the drivers and was mingled with the performance of other like driving services rendered by them otherwise than in interstate commerce. These trips were thus a natural, integral and apparently inseparable part of the common carrier service of the petitioner and of his drivers.

One or more such trips were taken by one or more drivers each week. The average number of drivers making one or more such trips in each week was nine drivers out of 37, or 24.4%. There were six weeks in which more than half of the drivers thus engaged directly in interstate commerce. The highest percentage of drivers making such trips in one week was 78.1%, when 25 drivers, out of the 32 then on duty, did so. As to the distribution of such trips, throughout the year, among the total of 43 drivers, every driver, except two, made at least one such trip with interstate freight. Each of the two who failed to make any such trip was employed for only about one-half the year and that was during the months when the trips in interstate commerce were the less frequent. On the other hand, one driver made 97 such trips in interstate commerce. Another made 52 and the average per driver was over 16. The greatest number of such trips made by a single driver in a single week was seven out of nine. In several other weeks he made six such trips out of a total of seven in the week. The net result is a practical situation such as may confront any common carrier engaged in a general cartage business, and who is prepared and offering to serve the normal transportation demands of the shipping public in an industrial metropolitan center. From the point of view of safety in interstate commerce, the hazards are not distinguishable from those which would be presented if each driver drove 4% of his driving time each day in interstate commerce. In both cases there is the same essential need for the establishment of reason-

able requirements with respect to qualifications and maximum hours of service of employees. If the common carrier is required, by virtue of that status, to take this interstate business he must perform the required service in accordance with the requirements established by the Commission. The Commission has made no exception in these qualifications and maximum hours of service that would exempt the drivers of the petitioner from them as a class. The applicability of the Commission's present requirements as to specific drivers during specific weeks is not the issue before us. We hold that the Commission has the *power* to establish qualifications and maximum hours of service, pursuant to the provisions of § 204 of the Motor Carrier Act, for the entire classification of petitioner's drivers and "mechanics" and it is the existence of that power (rather than the precise terms of the requirements actually established by the Commission in the exercise of that power) that Congress has made the test as to whether or not § 7 of the Fair Labor Standards Act is applicable to these employees.[13]

[13] "We recognize, as a practical matter, that private carriers transport property both in interstate and intrastate commerce. The same motor vehicle, operated by the same driver, on 1 or 2 days in a week may be engaged in transporting property in interstate commerce and the rest of the week may be engaged in intrastate commerce. In our opinion if a driver operates a motor vehicle in the transportation of interstate or foreign commerce on any day of a given week, such driver is subject to the weekly maximum herein prescribed. Likewise if a driver employed by a private carrier of property is engaged in interstate commerce during any one period of 24 consecutive hours, he is subject to the daily maximum herein prescribed. If such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations *herein prescribed* during that week. *We express no opinion as to whether or not during that week the driver is subject to the provisions of section 7 of the Fair Labor Standards Act.*" (Italics supplied.) *Ex Parte No. MC-3*, 23 M. C. C. 1, 39.

The above statement demonstrates the Commission's opinion as to its power to establish qualifications and maximum hours of service in

Congress has gone out of its way to make this purpose clear in cases comparable to the one before us. It has done this by making the power of the Commission, under § 204 of the Motor Carrier Act, expressly applicable to motor vehicle pickup and delivery service within terminal areas [14] to transportation in interstate commerce wholly within a metropolitan area,[15] and to casual, occa-

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the field of mixed interstate and intrastate transportation. The rules that it has prescribed have not extended to its full power to make rules in this field. The fact that this statement was made in 1940, three years before the decision of this Court in *Southland Co. v. Bayley*, 319 U. S. 44, explains the express reservation made as to the Commission's opinion relating to the effect of the scope of its unexercised powers under § 204 of the Motor Carrier Act in relation to § 7 of the Fair Labor Standards Act. For the Commission's regulations of Hours of Service (Carriers by Motor Vehicle) see 49 CFR Cum. Supp., Part 191.

[14] "SEC. 202. . . .

"(c) Notwithstanding any provision of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—

"(1) to transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; . . . ." § 202 (c) (1), 49 Stat. 543, as amended by 56 Stat. 300, 49 U. S. C. Supp. V, § 302 (c) (1).

[15] "SEC. 203. . . .

"(b) Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (8) The transportation of passengers or property in interstate or foreign commerce wholly within a municipality or between contiguous municipalities or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management, or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular route or routes in interstate commerce

sional, or reciprocal transportation of property in interstate commerce by any person not engaged in transportation by motor vehicle as a regular occupation or business.[16] It has made the Commission's power over safety requirements expressly applicable to these operations, even though, at the same time, Congress has exempted them from general regulatory control.

Congress furthermore has provided a special procedure by which, in an appropriate case, an *intrastate motor carrier* or any other party in interest, may secure the general exemption of such a carrier from compliance with the Motor Carrier Act even though such carrier does perform some interstate transportation. Congress, however, expressly has authorized the Commission, and not the courts, to decide when the case is an appropriate one for such a general exemption.[17] It does not appear that

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is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each State having jurisdiction; or (9) the casual, occasional, or reciprocal transportation of passengers or property in interstate or foreign commerce for compensation by any person not engaged in transportation by motor vehicle as a regular occupation or business." 49 Stat. 545–546, 49 U. S. C. § 303 (b) (8) and (9).

[16] See note 15, *supra*.

[17] SEC. 204 (a) It shall be the duty of the Commission—

. . . . . .

"(4a) To determine, upon its own motion, or upon application by a motor carrier, a State board, or any other party in interest, whether the transportation in interstate or foreign commerce performed by any motor carrier or class of motor carriers lawfully engaged in operation solely within a single State is in fact of such nature, character, or quantity as not substantially to affect or impair uniform regulation by the Commission of transportation by motor carriers engaged in interstate or foreign commerce in effectuating the national transportation policy declared in this Act. Upon so finding, the Commission shall issue a certificate of exemption to such motor carrier or class of motor carriers which, during the period such certificate shall remain effective and unrevoked, shall exempt such carrier or class of motor carriers from compliance with the provisions of this part, and shall

any such certificate of exemption has been obtained or sought as to this petitioner.

Having determined that the Commission has the power to establish qualifications and maximum hours of service for these drivers and "mechanics" under § 204 of the Motor Carrier Act, the question recurs as to whether, in the face of the exemption stated in § 13 (b) (1) of the Fair Labor Standards Act, the requirements of § 7 of that Act nevertheless apply to these employees. This issue as to the possible reconciliation of the language of these Acts so as to provide for concurrent jurisdiction was considered at length in the *Levinson* case and the conclusion was there reached that such a construction was not permissible.

This discussion has proceeded on the basis of the facts which were stipulated to exist in 1942. This treatment, however, should not be interpreted as necessarily restricting the District Court to the present record if, for good cause, that court finds it advisable to consider additional evidence or to retry the case *de novo*.

For these reasons, the judgment of the Circuit Court of Appeals is vacated and the cause is remanded to the District Court for further proceedings consistent with the opinion of the Circuit Court of Appeals, as here modified.

It is so ordered.

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attach to such certificate such reasonable terms and conditions as the public interest may require. At any time after the issuance of any such certificate of exemption, the Commission may by order revoke all or any part thereof, if it shall find that the transportation in interstate or foreign commerce performed by the carrier or class of carriers designated in such certificate shall be, or shall have become, or is reasonably likely to become, of such nature, character, or quantity as in fact substantially to affect or impair uniform regulation by the Commission of interstate or foreign transportation by motor carriers in effectuating the national transportation policy declared in this Act. . . ." 49 Stat. 546, as amended by 54 Stat. 921, 49 U. S. C. § 304 (a) (4a).

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1947.

James F. Morris, Petitioner,
v.
William R. McComb, Administrator of the Wage and Hour Division, United States Department of Labor.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 17, 1947.]

Mr. Justice Murphy, with whom Mr. Justice Black and Mr. Justice Douglas concur, dissenting.

Apart from § 13 (b) (1), it is clear that petitioner's truck drivers and mechanics are subject to the wage and hour provisions of the Fair Labor Standards Act. They spend virtually all of their time in transportation activities which are an integral part of the production of goods for interstate commerce. *Walling* v. *Comet Carriers*, 151 F. 2d 107. The issue thus becomes one of determining whether these employees are plainly and unmistakably within the terms and spirit of the § 13 (b) (1) exemption, giving due regard to the rule that exemptions from the operation of humanitarian legislation are to be narrowly construed. *Phillips Co.* v. *Walling*, 324 U. S. 490, 493.

By a pedantically literal reading of § 13 (b) (1), it is possible to say that these employees are among those as to whom the Interstate Commerce Commission has "power" to establish qualifications and maximum hours of service. A sporadic and minute portion of their activities, approximating 3% to 4% of the total, affects the safety of operation of trucks in interstate commerce. The Commission's power under § 204 (a) of the Motor Carrier Act is confined to regulation of transportation in interstate and foreign commerce; and its jurisdiction over

employees' activities is limited to those which affect the safety of operation of motor vehicles engaged in such transportation. *United States* v. *American Trucking Ass'ns*, 310 U. S. 534. Hence the potential scope of the Commission's "power" over petitioner's employees is extremely narrow. Approximately 97% of their activities are beyond the jurisdiction of the Commission. Yet it is by the slender thread of this "power" that they fall within § 13 (b) (1) and hence are deprived of the benefits of the Fair Labor Standards Act.

Due respect for the legislative purpose militates against such a result. We are dealing here with a statute that is dedicated to the proposition that laboring men are to be treated as something more than chattels. And their statutory rights are not to be discarded by adherence to formalistic dogmas of interpretation. Section 13 (b) (1) is not just an exercise in grammar. It is part of the living fiber embodying the rights of those who labor for others. It must be read and interpreted in the light of reason and in the light of the aims which Congress sought to achieve.

When that is done, it becomes clear that when § 13 (b) (1) speaks of those over whom the Interstate Commerce Commission has "power" it means those who perform at least a substantial amount of activities within the Commission's jurisdiction. Congress was not concerned with insignificant conflicts between Fair Labor Standards Act regulations and Interstate Commerce Commission regulations. Nor was it desirous of leaving unregulated nearly all of the working time of those who are engaged in the production of goods for commerce but who spend infinitesimal amounts of time directly in interstate transportation. In other words, engaging in an occasional and microscopic amount of activities affecting safety of operation should no more exclude employees from the Act than sporadically shipping insubstantial

amounts of goods in interstate commerce should bring those engaged in such shipments within the purview of the Act. See *Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 181. That was implicitly recognized by the Court in *Pyramid Motor Corp.* v. *Ispass*, 330 U. S. 695, 708, and I had not supposed until now that that case or *Levinson* v. *Spector Motor Co.*, 330 U. S. 649, justified any other result.

Interpreting § 13 (b) (1) in disregard of reality only acts as an open invitation to evade the Act and to destroy the statutory rights of those trucking concern employees who now perform no activities which affect the safety of operations. All that the employer need do to withdraw the benefits of the Act from these employees is to send them occasionally to a terminal to pick up or deliver a piece of interstate freight. They then fall into the "power" of the Interstate Commerce Commission and automatically lose their rights under the Fair Labor Standards Act. I accordingly dissent.

SUPREME COURT OF THE UNITED STATES

No. 7.—October Term, 1947.

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[November 17, 1947.]

Mr. Justice Rutledge, dissenting.

But for this Court's decisions in the *Levinson* and *Ispass* cases, my views in this case would be in substantial accord with those expressed by Mr. Justice Murphy. See *Levinson* v. *Spector Motor Service*, 330 U. S. 649, dissenting opinion at 685; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695. I thought the decisions in those cases foreshadowed the extreme result here, which goes so far as to exclude from the Fair Labor Standards Act's protection at least two employees who made no trips in what petitioner regards as the interstate phase of his business. While on the other hand one driver made 97 such trips, there were others who made only very occasional ones.

Although I regarded the *Levinson* and *Ispass* decisions as foreshadowing and perhaps concluding any situation where the employee's work would substantially affect safety in interstate operations, and thus as going to the extent of exempting from Fair Labor Standards Act coverage any employee whose work substantially affects such safety, I did not understand that all employees driving for a company engaged principally in intrastate commerce but doing a very small amount of interstate commerce would be lumped together, for purposes of the exclusion, on the basis of the proportionate amounts of work done by the company in those phases of its business. That

I think is the effect of the present decision. To that extent, I also think the ruling constitutes an extension of the exemption beyond that sustained in the *Levinson* and *Ispass* cases.

On the basis of the decision last term in *United States* v. *Yellow Cab Company*, 332 U. S. 218, I also have difficulty with the view that any of the carrier's services here were rendered in interstate commerce. That decision held that the transportation in Chicago of passengers and their luggage from their homes, offices, hotels, etc. to railroad stations for the purpose of boarding trains on interstate journeys, and conversely the like use of taxicabs in the reverse direction after leaving trains on arrival in Chicago following such journeys, were "too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act." 332 U. S. at 230. While I was not in agreement with the *Yellow Cab* decision, the same ruling, if applied to the facts here, would make the so-called "interstate commerce," *i. e.*, the transportation of freight from petitioner's customers' places of business to shipping terminals, intrastate rather than interstate commerce.[1]

I am unable to agree with the Court's opinion.

[1] I do not read the stipulation of facts in this case as showing that petitioner engaged in transportation from terminal to terminal.